No. ~~284~~ 74

In the Supreme Court of the United States

OCTOBER TERM, 1962

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant,

v.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (SINCE SUCCEEDED BY ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED BY ROLAND COCREHAM),
Appellee.

On Appeal From The Supreme Court of the State of Louisiana

BRIEF OF THE APPELLEE

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May It Please The Court:

QUESTIONS PRESENTED

The law applicable to this case is well settled. The question presented is not one of law but one of fact.

The proper questions for consideration by the Court are:

1. Does the Louisiana Use Tax discriminate against interstate commerce?

2. Does the Louisiana Use Tax impose a greater burden upon non-residents than upon Louisiana residents?

We concede that the State of Louisiana may not discriminate against interstate commerce.

We concede that the State of Louisiana may not impose taxes designed to favor its own residents and to tax more heavily nonresidents.

THE FACTS

The facts of this case have been stipulated by the parties.[1]

Appellant, Halliburton Oil Well Cementing Company, (hereinafter referred to as Halliburton) is engaged in the business of servicing oil wells throughout the oil producing states of the United States, including Louisiana. Its principal place of business is maintained in Duncan, Oklahoma, and there it manufactures, assembles, and builds specialized oil well service units which it employs in its oil well service operations.

Halliburton procures from various vendors throughout the United States raw materials, semi-finished, and finished articles necessary for the manufacture, assembly, and construction of well service units. When a well service unit has been completed at Duncan, Oklahoma and has been tested for operation it is assigned to one of Halliburton's various field camps in the United States, where it obtains a permanent situs unless transferred to another field camp location where greater use may be made of it. A certain number of these units came to rest in Louisiana

[1]The stipulation is contained in transcript of record pp. 22-30.

and obtained a permanent situs therein servicing oil wells located in Louisiana. Halliburton's books are kept in Oklahoma; they reflect the cost value of the units as comprising material cost, labor cost, and shop overhead.

In addition to the above units, Halliburton keeps in Louisiana certain cementing service units it purchased from the Spartan Tool and Service Company of Houston, Texas when that company determined that it should no longer continue in the business of servicing oil wells, and an airplane purchased from the Western Newspaper Union of New York, which companies are not regularly engaged in the business of selling cementing units or airplanes.

For the years 1952, 1953, 1954, and 1955, Halliburton regularly filed with the State of Louisiana tax returns showing the amount of use tax money, as reflected by its calculations, due the State of Louisiana by it on service units employed in the State. Such amounts were paid to the State of Louisiana at the time of filing the statutory use tax returns.

Halliburton used as its cost basis for computing the use tax on equipment manufactured by it only the cost of the component parts used in manufacturing the equipment brought into the State. Halliburton paid no tax whatsoever on the equipment and airplane purchased by it outside the State from persons not ordinarily engaged in the sale of such equipment (casual sale).

There is no evidence that any of the property

in question herein has been the subject of a similar tax in any other state.

The Collector of Revenue of the State of Louisiana (hereinafter referred to as Collector) determined a deficiency in the tax reported by Halliburton and determined that the cost of the completed manufactured equipment as of the time it became a part of the mass of property of the State of Louisiana necessarily was far greater than the price paid by Halliburton for the unassembled parts and material used in the manufacture of the final product of equipment used in the State of Louisiana. The Collector computed the cost of the equipment by aggregating not only the cost of component parts and materials but also the labor and shop overhead attributable to the particular piece of equipment. There is no dispute as to the accuracy of such computation.

The Collector also included in the determination of the deficiency the cost of the airplane and equipment brought into Louisiana which was purchased outside the State at casual sales by persons not ordinarily engaged in the business of selling such property.

Halliburton paid the deficiency under protest and sued for recovery under the appropriate Louisiana Statute.

Halliburton alleged that the use tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the

transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regualtion of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assesed.

The trial court agreed with Halliburton and rendered judgment in its favor. On appeal by the Collector, the Louisiana Supreme Court found that the use tax is imposed after commerce is at an end; it applies equally to all property as of the moment of taxation; and all taxpayers in similar position are equally treated. The Louisiana Supreme Court reversed the trial court and rendered judgment in favor of the Collector.[2]

[2]The opinion of the Supreme Court of Louisiana is reported at 241 La. 67, 127 So 2d 502, and is reproduced in transcript of record pp. 34-50.

The Louisiana Taxing Statute

The provisions of the Louisiana sales and use tax statute are contained in Louisiana Revised Statutes, Title 47, Sections 301 through 318. The pertinent provisions read as follows:

LSA-R.S. 47:302:

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

* * * * * * *

"C. * * *

"The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise,

license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Sub-title II of this Title."

LSA-R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

LSA-R.S. 47:301 (10)

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

LSA-R.S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property with-

out any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever."

LSA-R.S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

LSA-R.S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"'Dealer' is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any offers for sale at retail, or who has in his possesor consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has i nhis possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

"(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax

levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

* * * * * * *"

LSA-R.S. 47:303:

"The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

"On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the 'dealer', as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed, in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

LSA-R.S. 47:305:

"* * * * * * *

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale

at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

"The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state or after that date, unless the property has previously borne a sales or use tax in another state, equal or greater than the tax imposed by this Chapter."

SUMMARY OF ARGUMENT

The Constitutional principles that a state may not discriminate against interstate commerce and that a

state may not place a more onorous tax burden on a nonresident taxpayer than it does upon a resident taxpayer in similar circumstances are well established. Any discussion of jurisprudence establishing those principles seems unnecessary. The State of Louisiana does not quarrel with those established principles. Louisiana does, however, emphatically deny that its sales and use tax law are in contravention of those principles. A brief study of the pertinent provisions of the Louisiana sales and use tax law reveals the legislature purpose to establish perfectly complementary taxes calculated to insure that all tangible personal property coming to rest in Louisiana for use therein is the subject of a 2% excise tax whether the sales tax or the use tax at the first moment that such property is taken by a consumer for use or consumption.

In order to levy any tax a legislature must establish four considerations: (1) It must designate who the *taxpayer* will be; (2) It must establish the time at which the tax will be imposed—the *taxable moment*; (3) It must establish the bases upon which the tax will be computed, i.e., the *measure of the tax*; and, (4) It must establish the *rate* of tax.

The Louisiana Legislature set forth the following considerations in establishing the sales tax:

(1) It designated the *taxpayer* to be the consumer of tangible personal property.[3]

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[3]La. R.S. 47:304 provides in part: "The tax levied in this Chapter shall be collected by the dealer from the purchaser or consumer."

(2) It designated the *moment of taxation* to be the sale at retail of a tangible personal property which is in effect the first taking of possession of tangible personal property by the consumer for use or consumption.[4]

(3) It designated the *measure of the tax* to be the sales price which is the cost to the consumer.[5]

(4) It designated the *rate* of tax to be 2%.[6]

In levying the use tax as a complementary tax to the sales tax, the Louisiana Legislature designated four considerations which in effect are identical to those of the sales tax:

(1) It designated the *taxpayer* to be the consumer of tangible personal property.[7]

(2) It designated the *moment of taxation* to be the first possession by the consumer in the State of Louisiana of tangible personal property for use. Thus, while there is no sale in the use tax situation, the effective *moment of taxation* is the same as that for the sales tax.[8]

(3) It designated the *measure of the tax* to be the cost to the consumer. The cost was defined to be the retail price that such property

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[4]La. R.S. 47:302 A. (1)

[5]Ibid.

[6]Ibid.

[7]Op. cit. supra, f.n. 3.

[8]La. R.S. 47:301 (18) and 47:303.

would bring if sold at retail at the *taxable moment.*[9]

(4) It designated the *rate* of tax to be 2%.[10]

It is clear, therefore, that the Louisiana Sales Tax and the Louisiana Use Tax are identical. While there is no difference in the four considerations of the tax levy, the two taxable situations arise differently. In the sales tax situation the tangible personal property has already become a part of the mass of the property in the State prior to imposition of the tax, but it has not yet been taken by a consumer for use or consumption. It is merely in the hands of a retailer awaiting the moment of taking by the consumer. In the use tax situation the tangible personal property is brought into the State by the consumer and the four considerations arise immediately after commerce is at an end and the property has become a part of the mass of property in the State of Louisiana. In both taxable situations the property has been withdrawn from commerce at the time of taxation, and since commerce is at an end there can be no tax upon interstate commerce. There is no discrimination

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[9]La. R.S. 47:303. In interpreting section 303 the Louisiana Supreme Court in the case **Fontenot vs. S.E.W. Oil Corporation,** 232 La. 1011, 95 So. 2d 638 (1957) stated: "According to this section the person importing an article for use in this state must pay the 'use' tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail **as of the time of importation.** These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth." (Emphasis supplied) (95 So 2d 638, 640).

[10]La. R.S. 47:302 A (2).

against interstate commerce because the overwhelming majority of personal property sold at retail in the State of Louisiana subjected to the Louisiana sales tax has entered this State through the channels of interstate commerce. In the vast majority of cases the property which is the subject of the sales tax bears the same relation to interstate commerce that property subjected to the use tax has. Similarly, the use tax applies only in the case where the property has been withdrawn from commerce and has come to rest in the State. The treatment, therefore, by both tax levies is identical.

The imposition of the two complementary taxes absolutely insures that every item of tangible personal property used or consumed within the State of Louisiana is the subject of a 2% excise tax at the moment of its first taking into possession by the consumer for use or consumption. There is therefore perfect equality of treatment of both the taxpayer and the property as of the moment of taxation.

In its effort to insure perfect equality of the tax burden imposed by the sales and use taxes, the Louisiana Legislature provided that a credit be given for all similar taxes paid to another state,[11] thus there can

[11]La. R.S. 47:305 provides in part: "The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property, for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state. . . . If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this Chapter."

be no multiplication of the tax burden by successive use and transportation into Louisiana from states imposing a similar tax.

Halliburton's contention that the property acquired by it at casual sales outside of the State may not be the subject of the use tax because to so tax them would discriminate against the out-of-state purchaser in favor of the purchaser within the State of similar property at the casual sale which would be exempt from sales tax, is totally without merit. Any property sold at a casual sale within the State of Louisiana necessarily must have already been the subject of a 2% excise tax, either the sales or the use tax at the moment it was first sold at retail or first brought into the State for use and consumption. On the other hand it is possible that property acquired at casual purchases outside of the State may not have been the subject of a 2% excise tax, and it is the legislative purpose that all property used in the State be the subject of such a tax. If, however, property purchased at a casual sale outside the State has been subjected to a similar tax, the use taxpayer need only show such payment to receive the appropriate tax credit, and thereby he is placed on an equal basis with all other consumers of similar property within the State of Louisiana.

Halliburton's complaint that property manufactured by it outside of Louisiana for its own use within the State of Louisiana may not be the subject of a 2% use tax computed upon the total cost, because to do so

would discriminate against it as a non-resident taxpayer in favor of resident taxpayers similarly situated, is also totally without merit. The purpose of the use tax is to equate the 2% use tax burden with the 2% sales tax burden. Thus, the Louisiana Legislature provided that the first use of tangible personal property within the State of Louisiana is equivalent to a sale at retail[12] and subject to the use tax. The use taxpayer and the sales taxpayer who purchase similar property at retail in Louisiana and of equal value to that property brought into the State by the use taxpayer are subjected to identically the same tax burden and are therefore in equal competitive positions as of the moment of taxation.

Halliburton suggests that if it had manufactured similar equipment within the State of Louisiana for its own use rather than in Duncan, Oklahoma, its sales tax burden would not have been as great because no tax would have been imposed upon labor and shop overhead. In considering this argument of the Appellant, it is well to point out that neither the sales tax nor the use tax is imposed upon labor or shop overhead. Both taxes are imposed upon *cost*[13] to the taxpayer at the moment of taxation. What the cost was

[12]La. R.S. 47:303 provides in part: "For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected. . . ."

[13]"Cost" as defined for use tax purposes is its fair market value as of the taxable moment—or the same price that would have been paid had the property been acquired at retail within the State. **Fontenot vs. S.E.W. Oil Co.** 232 La. 1011, 95 So 2d 638. (1957)

before that moment is of no concern to the State of Louisiana, and what its cost, value, or price is after that moment of taxation cannot be of concern to the State of Louisiana. In the situation where manufacture occurs in Louisiana the consumer purchases or brings into the State component parts which are subject to either a sales or use tax at the appropriate taxable moment, and he may use those component parts in any manner which he may feel benefits his economic interests. His action is no different than that of the great majority of purchasers at retail of tangible personal property. More often than not a sales or use tax taxpayer uses the property upon which a sales or use tax has been paid in conjunction with other property upon which sales or use tax has also been paid in order to obtain an item of greater economic value to him than the separate items had prior to their joint use. This is true even in the case where the housewife purchases cake mix, and milk, and butter and combines them and bakes a cake which has a greater value or cost than the items had separately. Further economic use of property already subjected to a sales or use tax to increase its value is common. Certainly the State is not required to go beyond the taxable moment and assess additional cost or value upon items which have already borne a sales or use tax if they are subsequently combined into a more valuable object.

Halliburton is free to compete in Louisiana on the same basis as any other taxpayer whether he be a resident citizen or a non-resident because in each

case and for each taxpayer the tax is computed upon the cost of the tangible personal property at the first moment it comes into his hands in Louisiana for use or consumption in Louisiana. There is no discrimination.

ARGUMENT

The authority of a state to levy a sales tax and a complementary use tax is very well settled by the case, *Henneford v. Silas Mason*, 300 U. S. 577, 57 S. Ct. 524, 812 L. Ed. 436 (1936). Appellant does not dispute this power. It is equally well settled that a state may not levy a tax which discriminates against interstate commerce or which does not afford equal taxation to residents or nonresidents. No questions concerning the extent of the state's power to tax are presented.

Appellant here urges that in imposing its use tax on the value of property at the time it became subject to Louisiana's taxing jurisdiction Louisiana in fact discriminated. Appellee submits that its entire sales-use tax structure was drafted with scrupulous regard for uniformity and equality.

The Louisiana Sales Tax

The concept of a *sales* tax imposed upon the *retail* sales price of tangible personal property has as its basic consideration the placing of the incidence of the tax upon the consumer at the moment the property first comes into his possession for use or consumption. The consumer, therefore, is the "taxpayer". The *moment of taxation* is the first taking of possession of

property for use or consumption by the taxpayer. The *measure of the tax* is the retail cost of the property at the taxable moment.

No consideration in the tax law is given to what use of the property is proposed or to how the property will be consumed. As a practical matter, no such consideration can be given. It matters not if the moment after sale the property is destroyed without ever being of economic value to the taxpayer. The tax is nonetheless owed on the retail price as of the *moment of taxation*. Nor does it concern the taxing authority that the use to which the taxpayer puts the property may thereafter make the value of the property to the taxpayer many times that paid for it at retail. The tax is nonetheless owed on the retail price as of the *moment of taxation*.

There are four considerations expressed in the Legislative purpose of the *sales* tax:

(1) The establishing of the *taxpayer*—the consumer.[14]

(2) The establishing of the *moment of taxation*—the first taking of possession for use or consumption by the taxpayer.[15]

(3) The establishing of the *measure of the tax*—the cost to the consumer.[16]

(4) The establishing of the *rate*—2%.[17]

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[14]La. R.S. 47:304.

[15]La. R.S. 47:302 A (1).

[16]Ibid.

[17]Ibid.

It is not questioned that a sales tax is a valid exercise of a state's sovereign right to collect revenue through taxation. Like the *sales* tax, a *use* tax is equally a valid exercise of a state's sovereign right to collect revenue through taxation. "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."[18] Such a tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Why did Louisiana deem a use tax complementary to the sales tax necessary? To keep from driving the Louisiana consumer to out-of-state markets where it might be possible to purchase tangible personal property not subject to a similar tax thus placing the Louisiana retailer at a disadvantage was apparently not the only purpose. The use tax not only equated the competitive position of Louisiana retailers with the retailer outside Louisiana, it equated the competitive position of all consumers within the State, for it is clearly impossible for anyone to own tangible personal property in Louisiana upon which a 2% tax has not been paid at the first moment it came into the hands of a consumer in the State.

The Louisiana Use Tax

A simple comparison of the four considerations expressed in the Legislative purpose of the *use* tax with those of the sales tax shows them to be identical.

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[18]**Henneford v. Silas Mason Co.**, 300 U. S. 577, 583, 57 S. Ct. 524, 527.

(1) The establishing of the *taxpayer*—the consumer.[19]

(2) The establishing of the *moment of taxation*—the first possession for use or consumption by the taxpayer in Louisiana.[20]

(3) The establishing of the *measure of the tax*—the cost to the consumer.[21]

(4) The establishing of the *rate*—2%.[22]

The *sales* and *use* taxes are therefore identical taxes. The *taxpayer*, the *moment of taxation*, the *measure of the tax* and the tax *rate* is the same. As of the moment of first taking of possession for use by a consumer in Louisiana all tangible personal property bears a 2% tax computed on the same retail price, "cost", the position of each taxpayer and property similarly situated as of the taxable moment is identical.

It is respectfully suggested that the equal application of the sales and use taxes to all taxpayers whether resident or non-resident answers all the arguments of the appellant, for it would appear that

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[19]La. R.S. 47:304.

[20]La. R.S. 47:301(18) and 47:303.

[21]La. R.S. 47:303. In interpreting section 303 the Louisiana Supreme Court in the case **Fontenot vs. S.E.W. Oil Corporation,** 232 La. 1011, 95 So. 2d 638 (1957), stated: "According to this section the person importing an article for use in this state must pay the 'use' tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail **as of the time of importation.** These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that it, its then value or worth." (Emphasis supplied) (95 So. 2d 638, 640).

[22]La. R.S. 47:302 A(2).

there can be no discrimination under such circumstances. However, a particular consideration of each "phase" of complaint may be helpful.

Isolated Sale Phase

But, argues appellant, Louisiana grants an exemption from sales tax to an isolated sale within the State and refuse to do so to a similar sale outside the state—this says appellant is discrimination. The answer to this argument is simple. Louisiana lacks competence to tax or exempt transactions occuring outside of its jurisdiction. How can it look to the sale in Oklahoma in determining its tax basis. It can only look to value at the moment the property becomes subject to its taxing jurisdiction. In any event, all property sold at isolated sales within the state has already been the subject of a two percent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use. Further, the State of Louisiana provides a tax credit where the property in question has already been the subject of a similar tax outside the state. If appellant had shown that the property in question had been subject to a similar tax, the State would not have claimed further tax. Here there is perfect equality of treatment.

Labor and Shop Overhead Phase

We are also treated unequally, argues appellant, because some competitor could produce in Louisiana for its own use and thereby escape paying a tax on labor and shop overhead. We are therefore discrim-

inated against, complains appellant, because we are not a Louisiana resident.

Appellant insists that Louisiana is imposing a tax on "labor and shop overhead." The use tax is imposed upon the "cost" of the tangible personal property as of the *taxable moment* when Louisiana first has jurisdiction. As of the moment tangible personal property subject to the use tax becomes taxable such event is considered as a sale at retail, and the measure of the tax is the fair market value or value the property would have brought at a retail sale as of that moment, whether the value at that moment is greater or less than it was at a time prior to becoming subject to Louisiana tax. This is the interpretation of the use tax law as defined by the Louisiana Supreme Court.[23]

In this case cost of materials, component parts, labor and shop overhead were aggregated only because it was a reasonable method of determining value. There is no established market value for such equipment because there is no open market for it. Halliburton never sells its equipment; it only uses it itself.

Halliburton's insistence that the State seeks to tax labor and shop overhead as such is misleading and tends to confuse the issue. In fact, Halliburton and the Collector have stipulated[24] that if Halliburton had manufactured the identical equipment in Louisiana no tax would be imposed on the labor and shop over-

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[23]Op. Cit. Supra, f.n. 21.

[24]Transcript of Record, pp. 26 and 27.

head. Labor and shop overhead are not the subject of sales or use tax—only tangible personal property is subjected to the sales and use tax.

The production of equipment in Louisiana for use by the manufacturer is merely one of the multitude of uses to which tangible personal property may be put by the consumer. It is, perhaps, more usual than unusual for purchasers of tangible personal property to combine that property with other property into a more desirable item of tangible personal property. The taxing authority cannot look beyond the taxable moment to what happened before or what happened after such moment. The impossibility of administration and inequity of what appellant suggests the principle of equality requires can be seen by examples illustrating the absurd results of following appellant's argument.

Assume a Louisiana resident, Mr. Jones, desires to construct a cabin cruiser for his own use within the State. He purchases material and parts outside the State for $5,000.00, and pays 2% use tax thereon. After doing a good job he completes the cruiser which then has a retail value of $15,000.00. Must the State then come to Mr. Jones and say, "We didn't know you were going to put your purchases to such good use. You must pay an additional tax on $10,000.00 increased value." Assume further that one year after completing the cruiser the taxpayer re-appoints the boat and installs new engines at a cost of materials of an additional $10,000.00 upon which he pays a 2%

tax at the moment of first possession for use in the State. On completion of the improvement, the cruiser has a fair retail value of $50,000.00. Must the State now come again to the taxpayer for an additional 2% on the increased value? Does equality demand such action? If the taxpayer had brought the completed boat into the State, a 2% tax on $50,000.00 would have been imposed, because that was its value when Louisiana first acquired jurisdiction.

Carrying the absurdity a little further, suppose that the day after the tax was collected on the increased value, the boat burned. May the taxpayer claim a refund because the component parts had no value? If he had imported the ashes, no tax at all would have been charged for there would have been no value at the taxable moment. What happens after the *taxable moment* cannot be considered by the State in administering these taxes.

Would Mr. Jones' neighbor, Mr. Smith, who on seeing Jones' project, decided to build an identical cruiser, purchased the same parts and materials for $5,000.00 and paid the appropriate tax, but who for lack of ability produced a cruiser of a retail value of only $2,000.00, be entitled to a refund of tax on $3,000.00, because after the *taxable moment* the value of the component parts was less than that originally paid? If Mr. Smith had imported his boat on completion outside the State, he would have paid tax only on the $2,000.00 retail value not the cost of the component parts.

It is easily seen therefore that equality of treatment must depend upon and be determined as of the *taxable moment*, not upon what thereafter is done with such property.

In appellant's situation, all taxpayers, resident or non-resident, who bring similar equipment into the State manufactured for their own use, upon which no similar tax had been paid, would be taxed just as appellant.

Appellant confuses the facts by comparing dissimilar situations, and comparing the facts of his case at the taxable moment with facts existent at a time beyond the moment of taxation. The situations simply are not comparable for determining equality of taxation.

Further evidence that Louisiana seeks to place the 2% tax only on property used within its jurisdiction is shown by the provision contained in Louisiana Revised Statutes Title 47, Section 305, which provides:

> "It is not the intention of this Chapter to levy a tax upon articles of personal property imported into this State, or produced or manufactured in this State, for export;. . . ."

It should be noted by the Court that on pages 10 and 11 of its brief, Appellant in setting forth portions of Section 305 omits the words "or produced or manufactured in this State, for export;" thus leaving an erroneous impression as to the meaning of the section.

Appellant, like any other taxpayer whether resident or non-resident, is free to situate his business

where he feels he enjoys the best competitive position. Each possible location undoubtedly has its advantages and disadvantages. Local taxes are always a consideration for management. In Louisiana all taxpayers enjoy the same treatment as of the *taxable moment* and all are equally free to use whatever advantages their managerial skill may devise. Each taxpayer is in the same position in regard to Louisiana sales and use tax at the moment the tax is imposed.

In answer to Appellant's repeated suggestion that Louisiana imposes a penalty tax upon it because it produces outside the State, we again point out that neither the place of production nor the residence of the taxpayer is of consideration in imposing the tax. The tax is imposed for one reason only—because the property has become a part of the mass of property in the State and has not yet been subject of a sales or use tax either within the State of Louisiana or in another state. The cost as of the *taxable moment* is the basis of computation. The tax is computed on "cost" as of that moment and prior or subsequent use, value or cost are immaterial to the State insofar as the use tax is concerned.

CONCLUSION

It is submitted that the decision of the Louisiana Supreme Court should be affirmed.

Respectfully Submitted,

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Baton Rouge, Louisiana
December 29, 1961

PROOF OF SERVICE

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-ninth day of December, 1961, I served a copy of the foregoing *Brief for the Appellee*, upon the following named persons, by mailing—postage prepaid—copies to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

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